No. 89-193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
(AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Whether, under the preemption doctrine of *San Diego Unions* v. *Garmon*, 359 U.S. 236, and its progeny, a state court has jurisdiction over a suit by a supervisory grievance-adjuster challenging his expulsion from his union for loyalty to his employer where, if the allegations of his state court petition are true, his expulsion would constitute a violation of Section 8(b)(1)(B) of the National Labor Relations Act, and could be annulled by the National Labor Relations Board.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Over MEBA's Objection, Finnie Accepts An Offer To Become A Managerial Supervisor	3
B. The Unions Discipline Finnie For Serving As Chief Engineer Aboard The VALERIE F	4
C. Finnie Chooses Not To File NLRB Charges Challenging MEBA's Discipline, And Instead Files A State Court Action	4
SUMMARY OF ARGUMENT	6
REASONS FOR GRANTING THE WRIT	7
Introduction	7
THE OPINION BELOW SQUARELY CONFLICTS WITH THE PREEMPTION DECISIONS OF THIS COURT AND UNDERMINES SECTION 8(b)(1)(B) OF THE NLRA	9
CONCLUSION	15

TABLE OF AUTHORITIES

Cases Page

American Broadcasting Cos. v. Writers Guild, 437 U.S. 411 (1978) 9
Belknap, Inc. v. Hale, 436 U.S. 491 (1983) 2
District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO (Trinidad Corporation), NLRB Case No. 19-CB-5469 (1985) 10
Hanna Mining v. Marine Engineers, 382 U.S. 181 (1965) 10
Iron Workers v. Perko, 373 U.S. 701 (1963) 7, 9, 12, 14
Longshoremen v. Davis, 476 U.S. 380 (1986) 8
Machinists v. Gonzales, 356 U.S. 617 (1958) 7, 11, 12, 13
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 6, 11, 12
NLRB v. Electrical Workers, 481 U.S. 573 (1987) 12
Operating Engineers v. Jones, 460 U.S. 669 (1983) ..... *passim*
Plumbers' Union v. Borden, 373 U.S. 690 (1963) 11, 14
Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969) 6
San Diego Unions v. Garmon, 359 U.S. 236 (1959) ..... *passim*
Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 13
Writers Guild of America, West, Inc., 217 NLRB 957 (1975) 12

Statutes

28 U.S.C. § 1257(a) 2
National Labor Relations Act, 49 Stat. 449, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 *et seq.*
§ 8 ..... 2, 8
§ 8(b)(1)(A) 7
§ 8(b)(1)(B) ..... *passim*
§ 10(b) 11

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OPINIONS BELOW

The California Superior Court (City and County of San Francisco) wrote no opinion, but its judgment is reprinted in the Appendix ("App.") at 10a-11a. The unreported opinion of the Court of Appeal of California (First Appellate District, Division Four) reversing that decision is reproduced at App. 1a-9a.

JURISDICTION

On January 19, 1989, the Court of Appeal of California (First Appellate District, Division Four), issued a decision reversing a judgment of the California Superior Court (City and County of San Francisco),

which had dismissed respondent Finnie's action for lack of subject matter jurisdiction. On June 9, 1989, Justice O'Connor entered an Order extending the time for filing this Petition to August 3, 1989. Because the opinion of the California Court of Appeal finally disposed of the federal preemption issue and a reversal here would terminate the state court action, this Court has jurisdiction under 28 U.S.C. § 1257(a). *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983).

STATUTE INVOLVED

This case involves the federal labor law doctrine of "*Garmon*" preemption and the exclusive jurisdiction of the National Labor Relations Board ("NLRB" or "the Board") to adjudicate conduct which arguably constitutes an unfair labor practice under Section 8 of the National Labor Relations Act ("NLRA" or "the Act"). Section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B), provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE [1]

Former MEBA member Robert N. Finnie ("Finnie") brought this action in state court to overturn his expulsion from MEBA.[2] MEBA had expelled Finnie for disobeying the Unions' order to stop working as a supervisory griev-

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[1] The Statement of the Case is drawn from the statement of undisputed facts presented in the trial court, a statement which Finnie agreed was correct in all material respects.

[2] "MEBA" or "the Unions" will be used throughout this petition to refer collectively to the petitioners, District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, and National Marine Engineers' Beneficial Association, AFL-CIO.

ance-adjuster for an employer with which MEBA had a labor dispute. The nature of the labor dispute, the union trial process and the ensuing court proceedings are described below.

A. Over MEBA's Objection, Finnie Accepts An Offer To Become A Managerial Supervisor

When the events leading to this case arose, Finnie was a member of MEBA, a union which principally represents marine engineers, such as Finnie, who serve aboard ocean-going vessels. In the spring of 1979, Calrice, the owner of a vessel named the VALERIE F, breached its contract with MEBA and discharged the union members manning the vessel, including the VALERIE F's Chief Engineer. At the same time, Calrice entered into a contract covering the vessel with the Masters, Mates & Pilots union ("MM&P"), then a rival of MEBA. Because marine engineers have traditionally been MEBA members, the MM&P could not fill the VALERIE F Chief Engineer vacancy created by the discharge of the VALERIE F's MEBA members, and therefore urged Finnie to take the job.

When Finnie arrived in Jacksonville, Florida in March 1979 to join the VALERIE F, he learned that the MEBA opposed his replacing the previous Chief Engineer, as the Union felt its "vital interests" were at stake in the dispute. MEBA officers advised Finnie that the VALERIE F was a vessel on which MEBA members were not to work until the lockout of MEBA members by Calrice—and the ensuing strike of Calrice by MEBA—was resolved. An MEBA officer directed Finnie to leave the VALERIE F and warned him that if he sailed aboard the ship he would violate the MEBA Constitution, have disciplinary charges filed against him and risk losing his MEBA membership as a result. Finnie ignored MEBA's pleas and warnings and went on board the VALERIE F as Chief Engineer. As Chief Engineer on the VALERIE F, Finnie was a managerial "supervisor," and had the

power to, and did, settle grievances filed by rank-and-file crew members aboard the vessel.

After the vessel arrived in California and while it was being picketed by MEBA, the General Counsel of the National Labor Relations Board issued a complaint against Calrice. A settlement was reached shortly thereafter, under which Calrice agreed to honor the MEBA contract, and to replace the MM&P crew (including Finnie) with an MEBA crew. Finnie's employment was terminated and he was replaced as Chief Engineer.

B. The Unions Discipline Finnie For Serving As Chief Engineer Aboard The VALERIE F

As Finnie had been forewarned, union disciplinary charges were filed against him in June 1979. These charges detailed the encounter between Finnie and the MEBA officials, described Finnie's refusal to comply with their order that he not take the VALERIE F Chief Engineer position, and accused Finnie of having thereby violated "his oath of obligation as a member," as well as applicable provisions of the MEBA Constitution. Even though Finnie concededly had both the time and the money to attend his trial, he deliberately failed to appear at the hearing on the charges. The Trial Committee, after hearing proof, found Finnie guilty and recommended his expulsion. This recommendation was approved by an almost unanimous vote of the entire membership. Finnie was expelled from the Unions in March 1982, after his internal union appeals were denied.

C. Finnie Chooses Not To File NLRB Charges Challenging MEBA's Discipline, And Instead Files A State Court Action

Finnie unsuccessfully appealed his expulsion within MEBA, but chose not to file unfair labor practice charges with the NLRB challenging his expulsion as a violation of § 8(b)(1)(B) of the Act. Finnie instead filed a petition for writ of mandate in the California Superior Court (City and County of San Francisco), which alleged that

the Unions improperly expelled him, and thereby wrongfully interfered with his employment relationships. Finnie's petition sought his reinstatement to the Unions, compensatory damages to remedy the alleged harmful effect of that expulsion on his earnings, and punitive damages.

After Finnie conceded that he was a management grievance-adjuster, the Unions filed a motion to dismiss for lack of subject matter jurisdiction, alleging that Finnie's claim was preempted by federal law. The trial court granted the motion:

> The allegations of the petition, as supplemented by the moving papers on this motion, that petitioner was expelled from respondent unions for refusing to follow their directions to cease working for [Calrice] during said labor dispute and that as a result of said expulsion petitioner was unable to obtain employment and suffered loss of earnings, constitute allegations of conduct arguably in violation of Section 8(b)(1)(B) of the NLRA and arguably within the exclusive jurisdiction of the National Labor Relations Board (NLRB).
>
> Based on the foregoing findings, the court concludes that its jurisdiction is preempted by the NLRA and the NLRB, and that it lacks subject matter jurisdiction of the petition and the alleged cause of action of petitioner. [App. at 11a].

Finnie appealed to the California Court of Appeal (First Appellate District, Division Four), again asserting that his claim was not preempted and should be heard in state court. On January 19, 1989, the Court of Appeal reversed the trial court's dismissal of Finnie's petition, ruling that his allegations were not subject to federal labor law preemption. (App. at 9a). On February 16, 1989, the same court denied MEBA's Petition for Rehearing of the preemption issue. (App. at 12a). The

Unions' subsequent Petition for Review to the California Supreme Court, based on their contention that federal labor law preemption mandated dismissal of Finnie's petition, was denied on April 5, 1989. (App. at 13a).

SUMMARY OF ARGUMENT

This case raises issues of prime importance to employers, labor organizations and to the proper interplay of state and federal administration of the federal labor laws, in the area of the loyalty of managerial employees to their employers. It also presents another instance, often recurring, of attempted evasion of preemption principles[3] by a cause of action cast in a state court mold to disguise its conflict with federal labor laws. This Court should grant review for these reasons, and because the decision below is wholly inconsistent with the labor law preemption doctrine fashioned by this Court to "shield" the system of labor relations "from conflicting regulation of conduct", *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971):

1. The California Court of Appeal held that a state court may take jurisdiction over an action, brought by a management grievance-adjuster who was a union member, challenging his expulsion from his union for loyalty to his employer, even though such discipline by a union is arguably forbidden by Section 8(b)(1)(B) of the National Labor Relations Act and therefore within the exclusive jurisdiction of the NLRB. This state court ruling cannot be reconciled with the traditional federal preemption doctrine elucidated by this Court in *San Diego*

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[3] "[I]n referring to decisions holding state laws preempted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question, from that based predominantly on the primary jurisdiction of the National Labor Relations Board, although the two are often not easily separable." *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383 n.19 (1969). Here, of course, we address only the second category of preemption.

Unions v. *Garmon*, 359 U.S. 236 (1959), and subsequently reaffirmed in *Iron Workers* v. *Perko*, 373 U.S. 701 (1963), and *Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), to name only the decisions most directly on point.

2. The Court of Appeal's attempt to carve out an "exception" to federal labor law preemption for cases challenging "the manner" in which the union discipline was imposed on a management grievance-adjuster creates an anomaly in the uniform doctrine of federal preemption which is contrary to long-standing precedent of this Court, decisions which have jealously guarded the doctrine from such erosion by lower state courts. Contrary to the Court of Appeal's conclusion, *Machinists* v. *Gonzales*, 356 U.S. 617 (1958), does not support any such "exception". *Gonzales*, decided prior to *Garmon*, involved union discipline of a rank-and-file employee, conduct which was a "peripheral concern" of federal labor law (*Garmon*, 359 U.S. at 243) because it was expressly excepted from federal regulation by a proviso to § 8(b)(1)(A). *Gonzales*, 356 U.S. at 620. By contrast, in Section 8(b)(1)(B), Congress made the expulsion of a management grievance-adjuster like Finnie a central concern of the Act, and empowered the NLRB to afford Finnie a full remedy for his expulsion.

REASONS FOR GRANTING THE WRIT

Introduction

As this Court reiterated in *Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), in order to determine whether a state action may "coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA to govern labor-management relations", a court must ascertain "whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA". *Id.* at 675-676, citing *San*

Diego Unions v. *Garmon*, 359 U.S. 236, 245 (1959).[4] If the court finds the conduct at issue to be arguably prohibited or protected by the NLRA, "otherwise applicable state law and procedures are ordinarily preempted." *Jones*, 460 U.S. at 676.[5] The state court below conceded that the *Garmon/Jones* preemption rule applied to this case, but concluded that Finnie's petition fell under an exception to that rule. (App. at 5a). In what follows, we show that this case is controlled by *Garmon* and *Jones* and that the "exception" fashioned by the state court misinterprets the precedent upon

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[4] *Garmon* contains the classic formulation of the preemption doctrine:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate * * * constitute an unfair labor practice under § 8 [of the NLRA], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. * * * [T]o allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

Id., 359 U.S. at 244, 246.

[5] The lower court did not follow the preemption analysis mandated by *Jones*. While the court (App. at 8a-9a) correctly noted that "the *Board* must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance-adjusting duties before a section 8(b)(1)(B) violation can be sustained" (emphasis added), it erroneously concluded that "[t]he state court need not make any such inquiry in Finnie's case" (*id.*). Where, as here, a defendant raises a subject matter jurisdiction defense based on § 8(b)(1)(B) preemption, the *court* must determine whether the conduct at issue is "arguably" violative of Section 8(b)(1)(B) and thus subject to the Board's exclusive jurisdiction. *See, e.g., Longshoremen* v. *Davis*, 476 U.S. 380, 397 (1986) (in a *Garmon* preemption case, "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the Board.").

which the court below relied, and frustrates the federal labor policy expressed in Section 8(b)(1)(B) of the Act.

THE OPINION BELOW SQUARELY CONFLICTS WITH THE PREEMPTION DECISIONS OF THIS COURT AND UNDERMINES SECTION 8(b)(1)(B) OF THE NLRA

The NLRB and this Court have established that union discipline of supervisor members who are § 8(b)(1)(B) grievance-adjusters and who refuse to stop working for an employer with which the union has a labor dispute may constitute restraint and coercion of an employer prohibited by § 8(b)(1)(B), even when the union pressure is aimed at the grievance-adjuster rather than the employer. The theory underlying this interpretation is that such coercion indirectly restrains the employer's right to choose and retain a grievance-adjuster. *See American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 413-418, 421-426, 429-431 (1978) (charging, fining and expelling grievance-adjuster members for working during strike violates § 8(b)(1)(B)). Here, it is undisputed that as the VALERIE F Chief Engineer, Finnie was a Section 8(b)(1)(B) "employer representative for the adjustment of grievances," who had the power to, and did, adjust grievances. Accordingly, Finnie's expulsion for working for an employer with which MEBA had a labor dispute "arguably violated" § 8(b)(1)(B) of the Act. *Writers Guild*, 437 U.S. at 413-418, 421-422.

Writers Guild, combined with an unbroken line of preemption rulings in this Court (most significantly, *Garmon* and *Perko*), makes it plain that the California court erred when it found no preemption in Finnie's case. In *Jones*, the most recent preemption decision on point, this Court found union discipline "arguably violative" of Section 8(b)(1)(B) and the union member's suit preempted under *Garmon*, because the member's state court suit concerned alleged union "interference with

his contractual relationships with his employer." *Id.*, 460 U.S. at 683. Therefore, because Finnie's petition alleged that the union's discipline of him—as a management grievance-adjuster—interfered with his "existing or prospective employment" relationships (*Perko*, 373 U.S. at 705), the Unions' conduct is "arguably prohibited" by Section 8(b)(1)(B) of the Act and within the exclusive purview of the NLRB. Further, as in *Jones*, because the expelled member's state court action involves union discipline which arguably interferes with an employer's Section 8(b)(1)(B) right to select his grievance-adjusters, the state court lacks jurisdiction to entertain the claim. *Id.*, 460 U.S. at 679.

Indeed, on May 21, 1985, the NLRB General Counsel issued a § 8(b)(1)(B) unfair labor practice complaint against MEBA in a virtually identical case involving expelled MEBA member Albert R. Willard, a first assistant engineer employed by the Trinidad Corporation, another employer attempting to drive the MEBA off its vessels. *District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO (Trinidad Corporation)*, NLRB Case No. 19-CB-5469.[6] In view of the fact that the NLRB General Counsel saw fit to issue a complaint in *Willard*, there can be no doubt that MEBA's expulsion of Finnie "arguably violated" Section 8(b)(1)(B) of the Act.[7]

Finally, the rule of preemption was "designed to shield the system from conflicting regulation of conduct. *It is the conduct being regulated*, not the formal description of governing legal standards, that is the proper focus of

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[6] The case was subsequently dismissed when Willard withdrew his charges.

[7] *See Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 192 (1965) (the pronouncements of the General Counsel with respect to "the investigation of charges and issuance of complaints * * * are entitled to great weight.")

concern." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971) (emphasis added). *See also, Plumbers' Union* v. *Borden*, 373 U.S. 690, 698 (1963) ("It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, [citing *Garmon*], 'our concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered.' ") (emphasis in opinion). As *Jones* held, "[m]atters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve *uniform* as well as *effective* enforcement of the national labor policy." *Id.*, 460 U.S. at 681 (emphasis in original).[8]

While acknowledging this governing precedent, the California Court of Appeal nonetheless asserted that Finnie's petition centered on his "wrongful expulsion," thereby rendering his case indistinguishable from *Machinists* v. *Gonzales*, 356 U.S. 617 (1958), "because, like *Gonzales*, it involves only matters of internal union discipline." (App. at 4a).[9] The Court of Appeal's reliance

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[8] The timing of Finnie's suit is but one example of the threat his action poses to the uniformity of the federal labor law as regulated by the NLRB. Finnie (for reasons known only to him) chose to wait for over a year after his expulsion became final before filing his lawsuit. Thus, although his action was timely under the applicable four-year California statute of limitations, a Section 8(b)(1)(B) unfair labor practice charge was by then barred by the six-month limitations period of Section 10(b) of the Act. The decision of the state court below would permit a § 8(b)(1)(B) management grievance-adjuster to evade the Section 10(b) statutory command by the simple expedient of casting what is a § 8(b)(1)(B) claim in terms of "improper union disciplinary procedures." This procedural tactic provides an end-run around the federal limitations period and demonstrates the need for preemption.

[9] The California Court of Appeal's failure to recognize the employment-related nature of Finnie's claim may have rested on its erroneous premise that Finnie's allegations against the Unions were focused "solely on disciplinary proceedings against [him]

on *Gonzales*, a pre-*Garmon* decision, is wholly misplaced, for *Garmon* cited the dispute in *Gonzales* as an example of the type of conduct which "was a merely peripheral concern" of federal labor law. *Garmon*, 359 U.S. at 243-244. Accordingly, in *Gonzales*, this Court did not feel compelled to withdraw from the states the power of regulation over the conduct.[10] The *Gonzales* holding rests on the Court's affirmative determination, at the outset of its opinion, that

> the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied [by] the proviso to § 8(b)(1) of the Act * * *.

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which were not commenced until after his employment with Calrice had terminated". (App. at 2a). The lower court's assumption that there was no § 8(b)(1)(B) coercion in this case because Finnie no longer worked for Calrice when MEBA disciplined him ignores the fact that the Unions threatened Finnie with discipline, and successfully pressured Calrice to replace him, while he still worked for the company. Both the threat of discipline (*see Writers Guild of America, West, Inc.*, 217 NLRB 957 (1975)), and the direct coercion against Calrice (*see e.g., NLRB* v. *Electrical Workers*, 481 U.S. 573, 590 n.13 (1987)) also were themselves arguable violations of § 8(b)(1)(B). Moreover, Finnie's own petition asserted that as a result of MEBA's discipline of him for violating the Unions' constitution, he was unable to obtain employment in the maritime industry. As *Iron Workers* v. *Perko* holds, this is a classic case of union conduct arguably violative of § 8(b)(1)(B), because "the action here concerned alleged [union] interference with the plaintiff's existing or *prospective* employment relations." *Id.*, 373 U.S. 701, 705 (1963) (emphasis supplied).

[10] Whether *Gonzales* remains good law in an employee (rather than a supervisor) discipline case is an issue left open by *Borden*, 373 U.S. at 697, and questioned by the dissenting opinions in *Lockridge* of Justice Douglas ("I would affirm this judgment on the basis of * * * *Gonzales* * * * rather than overrule it" [403 U.S. at 302]) and Justice White ("[l]ike Mr. Justice Douglas, I would neither overrule nor eviscerate * * * *Gonzales*." [403 U.S. at 309]).

Id., 356 U.S. at 620. The primary concern in *Gonzales*, therefore, was that in the absence of any relevant federal law, the inability of the state courts to assert jurisdiction "would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights." *Id.* But, whereas Gonzales was a rank-and-file employee, Finnie was a management grievance-adjuster—a supervisor with loyalties to his employer—the discipline of whom Section 8(b)(1)(B) was enacted to regulate and remedy.[11] Thus, contrary to the Court of Appeal's conclusion (App. at 5a), the application of federal preemption principles *is* changed when "the disciplined individual is a supervisor for purposes of the NLRA," for (if he is, as here, also a grievance-adjuster) the dispute is thereby transformed from a strictly internal union matter to a matter involving the union and the employer, which is expressly regulated by Section 8(b)(1)(B).

Finally, in support of its assertion of jurisdiction, the Court below also mistakenly relied on *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978), which stated that the "critical inquiry" in a *Garmon* preemption case is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the [NLRB]". (App. at 8a). In *Jones*, however, decided five years after *Sears*, this Court "substantial[ly] reformulat[ed] . . . the 'identical' controversies standard of *Sears*" to hold that state and NLRA claims "are identical if they share an important factual element" or are the same 'in some fundamental

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[11] Indeed, the fundamental purpose of Section 8(b)(1)(B)—a unique statutory provision drafted by Congress to preserve the loyalty of managers to their employers—was to protect management supervisors, like Finnie, who have the power on behalf of management to settle rank-and-file employee grievances. In enacting this provision, Congress sought to insulate such management officials—and *only* such officials—from union discipline for exhibiting loyalty to their employers in the performance of their duties.

respect." *Jones*, 460 U.S. at 682, 688, 689-690.[12] The *Jones* standard compels preemption of Finnie's case, because his petition shares an "important factual element" with the complaint that Finnie could have filed with the NLRB.[13]

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[12] The distinction drawn by the California Court of Appeal (App. at 2a) between challenging a union's "right" to discipline a member and attacking the "manner" in which the discipline is imposed, is a distinction without a difference for § 8(b)(1)(B) preemption purposes. The statute nowhere states (and no case holds) that unions may discipline supervisory grievance-adjusters (and thereby coerce or restrain employers) so long as the disciplinary procedures used comply with the union's constitution and due process. Instead, as every Section 8(b)(1)(B) case finding an unfair labor practice (or holding a state court action preempted as challenging conduct "arguably violative" of that Section) shows, unions are routinely held to violate the Act whether or not a claim is made that the disciplinary procedures followed were improper.

In this connection, we note that Finnie cannot manufacture state court jurisdiction over the "manner" of his discipline by "conceding" that the Unions had the "right" to discipline him and thereby waive his Section 8(b)(1)(B) remedy and displace the exclusive jurisdiction of the NLRB. *Jones*, 460 U.S. at 680-681.

[13] In his petition, Finnie alleged that MEBA's expulsion "substantially impaired * * * his ability to obtain employment in his profession as a marine engineer," by depriving him of his use of the union's hiring hall, causing him to lose work and resulting in the loss of past and future earnings. The same allegations would have formed a "crucial element" of Finnie's NLRB case. *Jones*, 460 U.S. at 682. *See also, Perko*, 373 U.S. at 705, 706-707 and *Borden*, 373 U.S. at 694.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 3, 1989

APPENDIX

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A037274

Super. Ct. No. 780847
(San Francisco County)

ROBERT N. FINNIE,
Appellant,

v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT/
MARINE ENGINEERS' BENEFICIAL ASSOCIATION, et al.,
Respondents.

[Filed Jan. 19, 1989]

Robert N. Finnie (Finnie) appeals from the judgment dismissing his petition for writ of mandate against District No. 1—Pacific Coast District, Marine Engineers Beneficial Association and National Marine Engineers Beneficial Association (AFL-CIO) (collectively, the unions) for lack of subject matter jurisdiction. Finnie's claims are based on his expulsion from the unions. His petition alleges that the unions failed to follow their constitutions and bylaws in the proceedings leading to his expulsion, and that the unions' disciplinary procedures violated his right to due process under California law. The trial court determined that the petition is preempted

by the National Labor Relations Act (29 U.S.C. § 151, et seq., hereinafter NLRA) because it alleges conduct on the part of the unions arguably constituting an unfair labor practice under section 8 (b) (1) (B) of the NLRA (29 U.S.C. § 158 (b) (1) (B), hereinafter section 8 (b) (1) (B)). We find grounds for such preemption lacking in Finnie's circumstances and therefore reverse.

An extended discussion of the events that lead the unions to discipline Finnie is unwarranted because he concedes that the unions had the right to discipline him and complains only of the manner in which he was disciplined. The record indicates that Finnie, a marine engineer, failed to follow the unions' directive and proceeded to work on board a ship, the Valerie F, at a time when the unions were involved in a dispute with the shipowner, Calrice Transport, Inc. For present purposes, the conduct for which Finnie was disciplined may be characterized as crossing a picket line and working during a strike. He signed off the ship after one voyage. The unions state that they successfully pressured Calrice to replace Finnie. Finnie claims that he never intended to continue working for Calrice after the voyage, and that he voluntarily left the ship to work for another employer. We need not determine which version of the facts is correct because the petition is focused solely on disciplinary proceedings against Finnie which were not commenced until after his employment with Calrice had terminated. It is undisputed that Finnie had the power to adjust grievances of employeers aboard the Valerie F, and that he was a "supervisor" for purposes of the NLRA when he worked for Calrice.

Finnie's petition alleges that the unions' disciplinary procedures violated his rights in at least eleven respects. Finnie, a resident of Marin County, claims that he was victimized by the "personal vendetta" of a New Orleans union official, who "bent and twisted" the unions' rules to guarantee that his disciplinary proceedings would be

"nothing more than a kangaroo court." Certain of the more egregious charges may be outlined as follows. Finnie was entitled under the union constitution and bylaws to a trial in San Francisco, but the trial was held in New Orleans so that he would be unable to appear in his defense. He was tried in absentia and without the benefit of counsel because the unions required that his attorney be a licensed marine engineer and he could locate no such individual. He was not notified of the hearing on his union appeal until after the hearing was over and the appeal had been denied.

Finnie's theory is that apart from these and other procedural irregularities his punishment might have been less severe and he acknowledges that, if he prevails on his petition, the unions will have the right to re-try his case. (See *Taylor* v. *Marine Cooks & Stewards Assn.* (1953) 117 Cal.App.2d 556, 565.) In addition to reinstatement, he is seeking to recover for lost earnings and emotional distress occasioned by his loss of union membership, along with punitive damages.

The unions have already twice argued unsuccessfully that Finnie's claims are within the ambit of federal law. They first sought to remove the case to federal court, alleging that Finnie's suit was for violation of contracts between labor organizations within the meaning of section 301 (a) of the Taft-Hartley Act (29 U.S.C. § 185 (a)). District Judge Orrick determined that "[t]he action was properly brought in the state courts on a state cause of action," held that federal jurisdiction was lacking and remanded the case back to the superior court. (*Finnie* v. *District No. 1—Pacific Coast Dist., etc.* (N.D. Cal. 1981) 538 F.Supp. 455, 460.) The unions then asked the superior court to rule that Finnie's claims were governed by federal, rather than state labor precedents. Judge Pollak determined that Finnie's claims were "properly maintainable under California law," noting that "in the absence of a clearer indication of federal preemption,

[they] should be viewed as coming within long-established principles of state law, particularly in light of the history of this particular litigation."

Similar reasoning applies to the present claim of preemption under section 8 (b) (1) (B). We think that a finding of preemption would be somewhat anomalous at this stage of the case, after Finnie has twice been told that his claims are cognizable under California law. More importantly, portions of Judge Orrick's discussion are equally applicable here. His opinion notes that Finnie's dispute, "which involves the question of whether a union's internal disciplinary procedures violate the due process guarantees of the union's constitution, is one which a court can decide by simply focusing upon the union's constitution and by-laws. [Citing *Motor Coach Employees* v. *Lockridge* (1971) 403 U.S. 274, 296.] There exist no issues of potentially significant impact upon national labor policy requiring federal rather than state decision. In *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958), the Supreme Court held that state court jurisdiction was not preempted in a suit against a labor union by an individual who claimed he had been wrongfully expelled in violation of his contractual rights . . . . *Gonzales* is still valid precedent . . . to the extent that it suggests that disputes over purely internal union disciplinary matters, like the expulsion proceedings challenged in that case, are beyond the pale of federal preemption." (*Finnie* v. *District No. 1—Pacific Coast Dist., Etc., supra*, 538 F.Supp. at pp. 459-460.) We find that there is no preemption in Finnie's case because, like *Gonzales*, it involves only matters of internal union discipline.

"Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for union-member relations . . . . in contrast to the balance struck by Congress in labor-management relations which normally requires the exclusion of additional state rights or

remedies, in dealing with the rights of a union and its members, Congress acted interstitially to supplement state law." (Cox, *Labor Law Preemption Revisited* (1972) 85 Harv.L.Rev. 1337, 1372-1373, citing 29 U.S.C. §§ 413, 523 (a).) Thus, wrongful union discipline claims have been determined by California courts under California law both before and after the United States Supreme Court's landmark decision in *San Diego Unions* v. *Garmon* (1959) 359 U.S. 236, setting forth the doctrine of federal preemption in situations where a state purports to regulate activities constituting unfair labor practices under the NLRA. (See *Cason* v. *Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134; and *Posner* v. *Utility Workers Union of America* (1975) 47 Cal.App.3d 970.) Claims of wrongful expulsion from union membership are excepted from preemption under *Garmon* because the activities involved are viewed as a " 'merely peripheral concern' " of the NLRA touching interests " 'deeply rooted in local feeling and responsibility.' " (*Farmer* v. *Carpenters* (1977) 430 U.S. 290, 296-297, citing *Gonzales, supra.*) In the words of a leading commentator, "where the conflict is between a labor organization and its individual members, the danger of upsetting a federally-struck balance is so slight that there is no need for preemption." (Cox, *supra*, 85 Harv.L. Rev. at p. 1339.) Based on the following discussion, we conclude that the result dictated by the foregoing principles is not changed simply because the disciplined individual is a supervisor for purposes of the NLRA.

The transcript of the hearing on the unions' motion to dismiss suggests that the trial court was pursuaded in favor of preemption by the decision in *American Broadcasting Cos.* v. *Writers Guild* (1978) 437 U.S. 411. This case indicates that a union may commit an unfair labor practice under section 8 (b) (1) (B) when it disciplines a supervisor for crossing the union's picket line to per-

form supervisory work during a strike.[1] In determining whether union discipline restrains or coerces the employer within the meaning of section 8 (b) (1) (B), the NLRB must "inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks." (*Id.* at p. 430.) The *ABC* court determined that the NLRB had addressed those issues and sustained its finding that the Guild violated section 8 (b) (1) (B) by disciplining producers, directors and story editors (known as "hyphenates") who crossed picket lines to work for the networks during a writers' strike.

In deciding whether the Guild had the *right* to discipline the hyphenates, the *ABC* court had no occasion to consider the *manner* in which the discipline was imposed. Since the union's disciplinary procedures were not at issue in *ABC*, that case is not controlling with respect to Finnie's claims. The other case upon which the unions chiefly rely, *Writers' Guild of America West, Inc.* v. *Superior Court* (1975) 53 Cal.App.3d 468, is inapposite for the same reason. In *Writer's Guild*, which involved the same strike as *ABC*, the hyphenates sought damages from the Guild on the theory that the Guild's constitution and bylaws did not prohibit the conduct giving rise to their discipine. On the basis of *Hill* v. *United Brotherhood of Carpenter etc. of America, Local 25* (1975) 49 Cal.App.3d 614, which was later reversed in *Farmer* v. *Carpenters, supra*, the court determined that the hyphenates' claim was preempted. Assuming, *arguendo*, that

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[1] Section 8(b)(1)(B) provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Such coercion may include not only direct union pressure on the employer, but also pressure aimed at the grievance adjuster, on the theory that it indirectly affects the employer's right to choose and retain a grievance adjuster. (See *Plumbers, Local No. 364* (1981) 254 NLRB 1123, 1125.)

Writer's Guild remains good law notwithstanding *Farmer* v. *Carpenters*, it is distinguishable because the hyphenates, unlike Finnie, did not claim that they were denied notice, opportunity to prepare or a full hearing. (*Writer's Guild*, *supra*, 53 Cal.App.3d at p. 476.) Again, the union's right to discipline the hyphenates, not the manner of their discipline, was at stake.

Other United States Supreme Court authorities cited by the unions only serve to reinforce our conclusion that Finnie's claims are not preempted. Preemption will be found where the "crux" of the action is the union's wrongful interference with a member supervisor's employment, rather than wrongful expulsion from the union. (*Iron Workers* v. *Perko* (1963) 373 U.S. 701, 705; see also *Motor Coach Employees* v. *Lockridge*, *supra*, 403 U.S. at p. 296 [distinguishing *Gonzales* on the basis that "Lockridge's cause of action and claim for damages were based solely upon the procurement of his discharge from employment"]; and *Operating Engineers* v. *Jones* (1983) 460 U.S. 669 [complaint claiming union interference with employment contract].) Since the "crux" of Finnie's petition is wrongful expulsion, his case cannot be distinguished from that of *Gonzales*.

The unions suggest that *Gonzales* is distinguishable because the case involved a rank and file employee rather than a supervisory grievance adjuster. They contend that since the NLRB may order reinstatement of a supervisor, a remedy unavailable to Gonzales as a rank and file union member, the result in *Gonzales* was "dictated" by considerations of judicial economy. But the finding that Gonzales' claim was not within the NLRB's exclusive jurisdiction did not turn on the Board's remedial powers. "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do *directly* with matters of employment, and that the prin-

cipal relief sought was restoration of union membership rights." (*Plumbers' Union* v. *Borden* (1963) 373 U.S. 690, 697.) (Emphasis added.) The same statement is true of Finnie's case, and it disposes of the unions' additional argument that *any* discipline of supervisors "connected with their employment" is a violation of section 8 (b) (1) (B). Although Finnie's decision to work during a strike, a "matter of employment," caused the unions to commence disciplinary proceedings, the reason for the discipline is not at issue. The procedural malfeasance of which Finnie complains is unconnected with his employment except as an element of damages, and "[i]n this posture [speaking of *Gonzales*], collateral relief in the form of consequential damages for loss of employment was not to be denied." (*Ibid.*; see also Cox, *supra*, 85 Harv.L.Rev. at p. 1374 ["Allowing a judicial tribunal to award damages for loss of employment following wrongful expulsion from membership poses no significant threat to national labor policy"].) Finnie's petition is not preempted because it is only "indirectly" concerned with matters of employment.

We note finally that our conclusion follows from analysis of the preemption issue in accordance with the factors outlined in *Farmer* v. *Carpenters*, *supra*, and *Sears, Roebuck & Co.* v. *Carpenters* (1978) 436 U.S. 180. We must "determine the scope of the general [preemption] rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." (*Farmer*, *supra*, 430 U.S. at p. 297.) In analyzing the potential for interference, "[t]he critical inquiry . . . [is] whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the [NLRB]." (*Sears, Roebuck & Co.*, *supra*, 436 U.S. at p. 197.) As previously indicated, the "Board must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance-

adjusting duties before a section 8 (b) (1) (B) violation can be sustained." (*NLRB* v. *Electrical Workers* (1987) 481 U.S. 573 [95 L.Ed.2d 557, 571] [describing the "crux" of the holding in *ABC*].) The state court need not make any such inquiry in Finnie's case; it must only determine whether the unions disciplined Finnie in accordance with their own internal rules and the requirements of due process. In this regard, it is noted that "[t]he fairness of an internal union disciplinary proceeding is hardly a question beyond 'the conventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB." (*Boilermakers* v. *Hardeman* (1971) 401 U.S. 233, 238-239.) The potential for interference with federal labor regulation is slight in Finnie's case. (*Farmer, supra,* 430 U.S. at pp. 296-297; Cox, *supra,* 85 Harv.L.Rev. at p. 1339.)

California's interest in protecting its citizens from unfair treatment by a national organization also favors Finnie. If he was in fact sanctioned by a kangaroo court in a distant forum, then he is entitled to redress under the laws of this state. "Where the state interest is great and the risk of interference small, 'inflexible application of the [preemption] doctrine is to be avoided.'" (*Rodriguez* v. *Yellow Cab Cooperative, Inc.* (December 15, 1988, A037738)—Cal.App.3d —, quoting *Farmer, supra.*)

The judgment of dismissal is reversed.

PERLEY, J.

We Concur:

ANDERSON, P.J.

POCHE, J.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

No. 780-847

ROBERT N. FINNIE,

Petitioner,

vs.

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION (AFL-CIO),

Respondents.

JUDGMENT DISMISSING PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

The motion of respondents to dismiss the within action for the court's lack of subject matter jurisdiction came on for hearing before the above-entitled court on October 21, 1986. Petitioner and respondents appeared by their respective attorneys. The court has considered all of the moving papers of both sides on this motion, including the memoranda, declarations, and stipulations concerning the facts, the original petition filed by petitioner in this action, and the arguments of counsel. Based on the foregoing, the court makes the following findings:

1. It is undisputed that California Rice Transport, Inc., (Cal Rice), the employer of petitioner at the time of the labor dispute described in the petition, was engaged in interstate commerce and in operations affecting commerce within the meaning of the National Labor Relations Act (NLRA), and that respondents at said time were labor organizations whose members were employed in operations affecting commerce within the meaning of the NLRA.

2. It is undisputed that at said time petitioner was employed by California Rice Transport, Inc. as a supervisor and grievance adjuster within the meaning of Section 8(b)(1)(B) of the NLRA.

3. The allegations of the petition, as supplemented by the moving papers on this motion, that petitioner was expelled from respondent unions for refusing to follow their directions to cease working for Cal Rice during said labor dispute and that as a result of said expulsion petitioner was unable to obtain employment and suffered loss of earnings, constitute allegations of conduct arguably in violation of Section 8(b)(1)(B) of the NLRA and arguably within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

Based on the foregoing findings, the court concludes that its jurisdiction is preempted by the NLRA and the NLRB, and that it lacks subject matter jurisdiction of the petition and the alleged cause of action of petitioner. Accordingly,

IT IS ORDERED that respondents' motion to dismiss the petition on the ground that the court lacks subject matter jurisdiction thereof be, and it is hereby, granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby, dismissed on the aforesaid ground, with respondents to have their costs of suit.

DATED: October —, 1986

LUCY KELLY MCCABE
Judge of the Superior Court

Approved as to form:

CARTWRIGHT, SUCHERMAN & SLOBODIN, INC.

By _____
DENNIS KRUSZYNSKI

COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION: 4

A037274

San Francisco County No. 780847

FINNIE, ROBERT N.

vs.

DIST. NO. 1—PACIFIC COAST DIST., *et al.*

BY THE COURT:

The petition for rehearing is denied.

Dated: Feb. 16, 1989

ANDERSON
P.J.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
1st District
Division 4

IN BANK

No. A037274, S009140

ROBERT N. FINNIE

v.

DISTRICT NO. 1 PACIFIC COAST DISTRICT/MARINE, ETC., *et al.*

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed Apr. 5, 1989]

Respondents' petition for review DENIED.

LUCAS
Chief Justice